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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENTE PRADO-RODRIGUEZ,

Defendant and Appellant.

A152655

(Alameda County
Super. Ct. No. 177470A)

Defendant Vincente Prado-Rodriguez appeals from convictions, following a jury trial, of one count of first degree murder (Pen. Code, § 187, subd. (a))¹ and one count of second degree robbery (§ 211). As to both counts, the jury found defendant personally used a firearm (§§ 12022.5, subd. (a), 12022.53, subds. (b)–(d) & (g)), and as to count one found defendant inflicted great bodily injury (§ 12022.7) and that the homicide occurred during the commission of a robbery (§ 190.2, subd. (a)(17)(A)). On appeal, defendant contends (1) his sentence of life without the possibility of parole violates the Eighth Amendment’s prohibition against cruel and unusual punishment, or alternatively, that his counsel was ineffective for failing to make the claim; and (2) the case should be remanded to allow the trial court to exercise its discretion as to whether to strike the firearm enhancement attached to count two pursuant to Senate Bill No. 620 (2017–2018 Reg. Sess.).² The Attorney General agrees section 12022.53 applies retroactively and the

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² In his opening brief defendant also challenged imposition of a parole revocation fine, but withdrew this contention in his reply brief.

matter should be remanded. We affirm the judgment, but remand for the trial court to consider resentencing under amended section 12022.53, subdivision (h).

BACKGROUND

Given the issues on appeal, we need only summarize the facts pertaining to the crimes of which defendant was convicted.

The Robbery

On a May 2015 evening, Oakland Police Officers Michael Murphy and Raymond Morales responded to a dispatch of a victim having been “pistol whip[ped].” At the scene, the victim told the officers he had been robbed at gunpoint by two men who drove up in an SUV (later identified as a Jeep) with a stripe on the side. While speaking with the victim, Officer Murphy heard a radio broadcast of a shooting that “occurred approximately 12 blocks away” involving an SUV that appeared to match the one the robbery victim described. After obtaining the victim’s contact information, the officers proceeded to the location of the shooting, less than a mile away.

At trial, the robbery victim testified he had been at a laundromat with his mother and sister and, with his sister, had gone to get something to eat. When the two returned, he saw two men standing on a nearby corner, but did not think anything of it. However, when he parked the car, the two men “ran up,” “opened the door,” and pointed a gun at him. The shorter of the two, later identified as defendant, was wearing a red, white and black 49ers jacket and a black beanie pulled over his face. Defendant opened the driver’s side door, pointed the gun at the victim, and demanded his money. When the victim replied he did not have “‘anything,’ ” the defendant hit him “on the cheek with the gun,” leaving a cut. The two men then took his cell phone and car keys, ran toward the awaiting Jeep, and left the scene. The victim went into the laundromat, told his mother what happened, and called the police. He later provided officers with the box in which his cell phone came.

The jury was also shown surveillance footage of the robbery and the Jeep.

The Murder

Upon arriving at the scene of the shooting, Officer Murphy activated his portable digital recording device. He found the victim on the ground, surrounded by 15 to 20 people. The victim had “blood on his chest area.” Officer Murphy saw no weapons near him. The victim was transported to Alameda County hospital where he died.

In the meantime, Officers Mathias Sather and Robert Rodriguez responded to a dispatch of a shooting on 39th Avenue. Officer Sather spoke to a resident who had heard five gunshots, and on looking out his window, had seen a male wearing a black ski mask holding a small gun, which the resident believed was a .22-caliber pistol. The man shot five more times at a person “who was running into the front of the house.” The shooter then ran onto the driveway of a neighboring house, and got into an awaiting vehicle that headed southbound.

The following morning, Officer Chris Moreno, who was working undercover, was dispatched to an area in East Oakland to look for a “green Jeep Cherokee, mid—maybe mid-90s model.” After Officer Moreno spotted the vehicle, he parked “somewhat away from it but where I have an unobstructed view” and observed “a male, Hispanic, a young male Hispanic exit” a building and walk toward the Jeep. The man went back into the building, came back out, looked around, and then grabbed a “garden hose and started to spray the vehicle down.” Officer Moreno later “saw a female Hispanic and then a male Hispanic get into the car” and drive away. Officer Moreno followed. At that point, a decision was made to contact the suspects, and uniformed officers were sent to the scene. Officer Moreno continued in pursuit. As uniformed officers arrived, Officer Moreno saw “a male Hispanic,” he later identified as defendant, “in the driver’s seat of that Jeep exiting the car [and] running away from the officers.”

Uniformed Officers Kathryn Jones and Edgar Macedo, who also had been maintaining surveillance of the Jeep, were directed to contact the occupants. When Officer Jones pulled up to the vehicle, defendant exited the Jeep and walked “over to the sidewalk quickly.” He was wearing a black or dark colored sweater and a black hat, which he later tried to discard. Officer Macedo activated his personal digital recording

device and ordered defendant to stop. Defendant “started to run,” with Officers Macedo and Jones in pursuit. Officer Jones then returned to the vehicle, while Macedo pursued defendant. Back at the Jeep, Officer Jones found codefendant Gabriel-Martinez and an infant, defendant’s and Gabriel-Martinez’s daughter. After detaining Gabriel-Martinez in her squad car, Jones recovered two cell phones from the infant’s car seat.

Officer Macedo caught up with and arrested defendant in a nearby park.

The district attorney filed a complaint charging defendant with one count of murder of Basilio Ramirez (§ 187, subd. (a)) with a firearm enhancement (§§ 12022.5, subd. (a), 12022.7, subd. (a), 12022.53, subds. (b)–(d) & (g)) and a special circumstance that the murder was committed during a robbery (§ 190.2, subd. (a)(17)(A)). Defendant was also charged with one count of second degree robbery (§ 211), also with a firearm enhancement (§§ 12022.5, subd. (a), 12022.53, subds. (b) & (g)).³

At trial, the murder victim’s brother testified that on the evening of the crime, he was watching television with his children and the victim was outside doing laundry and talking on his cell phone. The brother heard someone screaming, and when he went outside, he saw people standing around and a man “holding a gun,” about 15 feet away. He then saw the man shoot his brother. When the brother screamed, defendant pointed the gun toward him. But after another neighbor screamed, defendant ran toward an awaiting Jeep.

Officers could not find the murder victim’s cell phone at the scene. Sergeant Nicholas Calange testified that the brother provided him with the box in which the victim’s cell phone came. Sergeant Calange then left the scene and obtained coordinates from the murder victim’s cell phone provider. Sergeant Calange then arranged for plainclothes officers “to try to go out to this location . . . and see if they can locate either the phone or any clue that might lead us further down the road.”

³ Cinthia Gabriel-Martinez was also charged but later pleaded no contest to lesser offenses and admitted an arming allegation, in exchange for a maximum prison sentence of six years and eight months.

Another witness to the shooting testified he was on his way home from work and when he tried to turn onto his street, he was blocked from doing so by a green Jeep. He saw Gabriel-Martinez sitting in the driver's seat. As he sat in his car behind the Jeep, he saw two men approach, the one who approached from the "backside of the driver's side" was wearing a black ski mask and a 49ers jacket. He thought the first man, the taller of the two, who was not wearing a mask, was Latino. The two men did not, however, get into the Jeep. Instead, they continued into the neighborhood. The witness then heard "[m]ore than two" gunshots. After that, the two men returned to the Jeep and got in, and the vehicle drove away. As the Jeep pulled away, the witness saw the shorter man remove his mask and saw he was holding a gun. The witness subsequently identified Gabriel-Martinez in a photograph lineup, and later at trial, he identified her as resembling the woman he saw driving the Jeep. The witness also was able to identify the Jeep she was driving and defendant's 49ers jacket and beanie as those resembling those worn by the masked man in court.

The jury also saw surveillance footage of the Jeep as it approached a gas station, about an hour after the murder, which showed defendant wearing a 49ers jacket and black beanie, the unidentified cohort, and Gabriel-Martinez getting out of the driver's side.

Criminalist Helen Wong testified she conducted DNA testing on the gun used for the murder, a 49ers jacket and black beanie recovered in the search of defendant's address. The results revealed DNA from multiple sources, but Wong could not eliminate defendant and Gabriel-Martinez.

Criminalist Susan Molly, an expert in tool markings and firearm identification, testified the bullet fragments recovered during the autopsy were fired by the same gun that was found on defendant.

The parties stipulated defendant was 19 years old at the time of the murder.

The jury found defendant guilty of both counts and found true the allegations and special circumstance that the murder was committed in the course of a robbery.

Sentencing

While acknowledging there was little doubt three people, including the defendant, had participated in a robbery that led to the murder victim's death, defense counsel maintained "the jury came to the wrong decision as to the special circumstance allegations, specifically whether or not [defendant] was the shooter." And had the jury decided differently, defendant "would fall under the Youthful Offender Law" (§ 3051⁴) and would have "a chance of getting out as a late 40-year-old or early 50-year-old man." In fact, before trial the DA made an offer "that would have allowed him to be under the Youthful Offender Law." Defendant had turned the offer down, counsel suspected, in part, because of his age. Counsel pointed out "the [L]egislature recognizes that the brain of an 18-year-old, a 19-year-old, a 20-year old, and a 21-year-old is fundamentally different than the brain of a 25-year-old."

Counsel then highlighted defendant's youth; his childhood environment which included a parent who abused drugs, was incarcerated and a victim of domestic violence; his "incredible progress," while in jail, including obtaining his high school diploma and attending parenting, substance abuse, and anger management classes; his "strong community support"; and his acknowledgement of and remorse for what happened.

While acknowledging defendant's progress, the trial court stated its "hands are tied" and sentenced defendant to an indeterminate term of life without the possibility of parole as to count one, the midterm of three years in prison plus 10 years "for the use of a weapon," for a total of 13 years for count two, to run consecutively to count one. The court also imposed various fines and fees.

⁴ Section 3051 provides, in pertinent part: "A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger . . . at the time of his or her controlling offense. [¶] . . . [¶] This section shall not apply to cases . . . in which an individual is sentenced to life in prison without the possibility of parole for a controlling offense that was committed after the person had attained 18 years of age." (§ 3051, subds. (a)(1) & (h).)

DISCUSSION

Life Without Possibility of Parole

Defendant contends his LWOP sentence violates the Eighth Amendment and therefore he must be resentenced.

Forfeiture

While defense counsel objected to the LWOP sentence, he did not do so on the ground it was constitutionally prohibited under the Eighth Amendment. Rather, his objection was that the jury had wrongly found true the special circumstance allegations as to defendant. Accordingly, the constitutional claim he is now advancing on appeal is forfeited. (*People v. Baker* (2018) 20 Cal.App.5th 711, 720 [challenge to sentence as cruel and unusual is forfeited if not made in the trial court].)

Ineffective Assistance of Counsel

Anticipating forfeiture, defendant alternatively contends failure of his attorney to object on Eighth Amendment grounds constituted ineffective assistance of counsel.

“ ‘In assessing claims of ineffective assistance of trial counsel, we consider whether counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome.’ ” (*People v. Gamache* (2010) 48 Cal.4th 347, 391 (*Gamache*).)

“In considering a claim of ineffective assistance of counsel, it is not necessary to determine ‘ “whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” ’ ” (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008.)

In the instant case, no prejudice flows from defense counsel’s failure to make an Eighth Amendment claim because no such claim would have succeeded. On the contrary, the law is well-established that the Eighth Amendment does not prohibit a LWOP sentence for crimes committed when a defendant is 19 years of age. (E.g., *People*

v. Edwards (2019) 34 Cal.App.5th 183, 186, 190–192 [rejecting argument that 19-year-old defendants sentenced to 95 and 129 years to life was cruel and unusual or violated equal protection clause]; *People v. Perez* (2016) 3 Cal.App.5th 612, 617–618 [rejecting similar argument from defendant who was 20 years old at the time of his crime and sentenced to 86 years to life]; *People v. Abundio* (2013) 221 Cal.App.4th 1211, 1220–1221 [rejecting similar argument from defendant who was 18 years old at the time of the crime]; see *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482 [rejecting similar argument from defendant who was 18 years and five months old].)

Defendant acknowledges “various California courts have declined to extend *Miller*^[5] beyond the age of 18 years.” He nevertheless submits that “in light of the increasing body of scientific evidence regarding neurological development and the expanding changes in age-related legislation in the criminal arena,” this court should hold otherwise. In support, he cites three out-of-state cases extending *Miller* to defendants over the age of 18: *State v. O’Dell* (2015) 183 Wn.2d 680; *People v. House* (2015) 72 N.E.3d 357⁶; and *Cruz v. United States* 2018 WL 1541898 (D. Conn. 2018).

We are bound, however, by the decisions of our Supreme Court, which has rejected efforts to extend *Miller* to those over the age of 18. (E.g., *Gamache, supra*, 48 Cal.4th at p. 405; cf. *People v. Gutierrez* (2014) 58 Cal.4th 1354 [contrasting defendants 18 years old and under (juveniles) from those over 18, in invalidating statutory presumption of juvenile LWOP sentence as contrary to *Miller*].) As the high court stated in *Gamache*: “We previously have rejected the argument that a death penalty scheme that treats differently those who are 18 years of age and older, and those younger than 18, violates equal protection. [Citations.] Indeed, the United States Supreme Court has concluded the federal Constitution draws precisely this line, prohibiting the death penalty for those younger than 18 years of age, but not for those 18 years of age and older. (*Roper v. Simmons* (2005) 543 U.S. 551, 574, . . . [‘The age of 18 is the point

⁵ *Miller v. Alabama* (2012) 567 U.S. 460.

⁶ Judgment vacated by *People v. House* (2018) 111 N.E.3d 940 and ordered to be reconsidered in light of *People v. Harris* (2018) 120 N.E.3d 900.

where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.’.]” (*Gamache*, at p. 405.) Nor, said the court, “does consideration of ‘evolving standards of decency’ [citation] under the Eighth Amendment to the federal Constitution lead us to a different conclusion. When the United States Supreme Court recently considered this issue, it identified an emergent national consensus that execution of individuals for crimes committed when younger than 18 years of age was cruel and unusual. (*Roper v. Simmons*, *supra*, 543 U.S. at pp. 564–567.) It identified no comparable consensus for crimes committed by those age 18 or older. (See *id.* at pp. 579–581 [documenting that no state with a death penalty had a minimum age higher than 18].) Accordingly, we cannot say evolving standards of decency require abolition of the death penalty for crimes committed by 18 year olds.” (*Gamache*, at p. 405.)

We therefore need not, and do not, address the out-of-state cases on which defendant relies. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [“tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction”].)

Because defendant was not prejudiced by counsel’s failure to object to his LWOP sentence on Eighth Amendment grounds, he cannot succeed on a claim of ineffective assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 694.)

Senate Bill No. 620

Effective January 1, 2018, Senate Bill No. 620 (2017–2018 Reg. Sess.) amended subdivision (h) of section 12022.53 to add the following language: “(h) The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (§ 12022.53, subd. (h); Sen. Bill No. 620 (2017–2018 Reg. Sess.) § 2.)

The Attorney General acknowledges Senate Bill No. 620 (2017–2018 Reg. Sess.) applies to defendant. He further acknowledges the matter should be remanded to allow the trial court to consider whether to strike or dismiss the gun enhancement, since the

record does not demonstrate the court would have refused to do so had it had such discretion at the time of sentencing.

DISPOSITION

The judgment of conviction is affirmed. The matter, however, is remanded for the trial court to consider resentencing under section 12022.53, subdivision (h).

Banke, J.

We concur:

Humes, P.J.

Margulies, J.

A152655, *People v. Prado-Rodriguez*

